No. 17-965

In the Supreme Court of the United States

DONALD J. TRUMP, ET AL.,

Petitioners,

v.

STATE OF HAWAII, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE* THE ASSOCIATION OF ART MUSEUM DIRECTORS, THE AMERICAN ALLIANCE OF MUSEUMS, THE ASSOCIATION OF ACADEMIC MUSEUMS AND GALLERIES, THE COLLEGE ART ASSOCIATION OF AMERICA, AND 112 ART MUSEUMS IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICI CURIAE*[1]

Amici are four organizations that serve the art museum community (the Association of Art Museum Directors, the American Alliance of Museums, the Association of Academic Museums and Galleries, and the College Art Association of America) and 112 art museums located throughout the United States.[2] The mission of the museums, supported by the organizations, is to serve the public by making great works of art, representing the full range of human experiences, available to a wide audience. This mission is threatened by Proclamation No. 9645, 82 Fed. Reg. 45,161 (Sept. 24, 2017) (the "Proclamation"), which prevents museums in the United States from presenting certain works of art and performances that reflect the experiences of people from the eight countries covered by the Proclamation, as well as from other parts of the world.

The Proclamation and prior Executive Orders[3] already have caused some of the *amici* museums to

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief, in whole or in part, and no person or entity other than *amici* and their counsel made a monetary contribution to its preparation or submission. Petitioners have filed a blanket letter of consent. Consent from Respondents has been lodged with the Clerk's office.

[2] The full list of *amici* art museums is included in Appendix A.

[3] Exec. Order No. 13,769, 82 Fed. Reg. 8,977 (Feb. 1, 2017); Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017).

cancel or postpone planned exhibitions. These exhibitions, which would have showcased important works by artists from the covered countries, are jeopardized because the artists themselves, or other necessary personnel (such as the lenders, collectors, couriers, and curators), are not able to travel to the United States under the Proclamation. Even artists and other contributors not directly covered by the Proclamation have canceled museum events in the United States because of the uncertainty and fear that the Proclamation has created for foreign nationals. By limiting the range of artistic expression available in the United States, the Proclamation will continue to cause substantial and irreparable harm to the *amici* and the American public.

This brief describes a recent performance in the United States that would not have occurred had the Proclamation been in place at that time, the negative effects the Proclamation has had on museums' mission, and planned exhibitions and performances that are jeopardized by the Proclamation.

SUMMARY OF ARGUMENT

> *"[T]he life of the arts, far from being an interruption, a distraction, in the life of a nation, is very close to the center of a nation's purpose—and is a test of the quality of a nation's civilization."*[4]

Art has played a pivotal role in defining the United States since its inception. As the primary means by which the public experiences art, museums are an anchor of American culture and democratic society. By fostering creativity, tolerance, and cultural enrichment, our museums promote American values, both at home and abroad.

The *amici* museums serve the American public by presenting visual arts and performances that cover the full range of human artistic expression. In support of this mission, the *amici* museums regularly host exhibitions with international impact that welcome artists, performers, and visitors from the United States and other countries. These exhibitions foster important cross-cultural exchanges and spark healthy public discussions, which are threatened by the Proclamation.

On January 27, 2017, President Donald J. Trump signed Executive Order 13,769, which suspended for 90 days "immigrant and nonimmigrant entry into the United States of aliens"

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[4] John F. Kennedy, *The Arts in America*, Look, Dec. 18, 1962, at 106.

from seven predominantly Muslim countries.[5] Following several successful legal challenges to that order, on March 6, 2017, the President issued Executive Order 13,780, which went into effect on March 16, 2017, and barred (with certain exceptions) the nationals of six Muslim-majority countries—Iran, Libya, Somalia, Sudan, Syria, and Yemen—from entering the United States for at least 90 days.[6] New legal challenges followed, and *amici* filed briefs in support of Respondents in actions before the U.S. Circuit Courts of Appeals for the Fourth and Ninth Circuits and this Court.[7] Before this Court rendered a decision, however, on September 24, 2017, President Trump issued Proclamation 9645.[8] The Proclamation applies to nationals of eight countries: six Muslim-majority countries (Chad, Iran, Libya, Somalia, Syria, and Yemen), North Korea, and individuals affiliated with certain government

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[5] Exec. Order No. 13,769, 82 Fed. Reg. 8,977 (Feb. 1, 2017).

[6] Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017).

[7] *See* Brief for The Association of Art Museum Directors et al. as *Amici Curiae* Supporting Respondents, *Trump v. Int'l Refugee Assistance Project* & *Trump v. Hawaii*, Nos. 16-1436 & 16-1540 (Sept. 18, 2017); Brief for The Association of Art Museum Directors et al. as *Amici Curiae* Supporting Plaintiffs-Appellees and Opposing Defendants-Appellants' Motion for a Stay and on the Merits, *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554 (4th Cir. Apr. 19, 2017); Brief for The Association of Art Museum Directors et al. as *Amici Curiae* Supporting Plaintiffs-Appellees and Affirmance, *Hawaii v. Trump*, 859 F.3d 741 (9th Cir. Apr. 21, 2017).

[8] Proclamation No. 9645, 82 Fed. Reg. 45,161 (Sept. 24, 2017).

agencies in Venezuela (together, the "Designated Countries"). Restrictions on immigration vary among the countries. Unlike the prior Executive Orders, the Proclamation is indefinite in temporal scope.

The Proclamation has had a significant negative impact on the *amici*'s ability to conduct the kind of cross-cultural, dynamic global exchanges that make Americans more informed and, thereby, America stronger. Many of these exhibitions and performances are dependent upon the presence of participants who are nationals of one of the Designated Countries. The negative effects of the Proclamation and prior Executive Orders have already been felt, as several museums have postponed or canceled future exhibitions that require foreign artists, lenders, collectors, curators, scholars, couriers, and others whose ability to contribute can no longer be assured.[9] Certain foreign contributors have been denied visas to the United States, thereby depriving *amici* and the American public of their perspectives and expertise. Still other contributors have curtailed their travel to and from the United States because of the increased scrutiny of foreigners

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[9] In many instances, the Proclamation will not only prevent the exhibition of important works of art in the United States, but it will do so in contravention of national policy. Many exhibitions involving loans of art from foreign countries receive immunity under 22 U.S.C. § 2459. Before granting the protections of the statute, the State Department must determine that the exhibition is in the national interest. In those cases, if the Proclamation causes the exhibition to be canceled, the national interest is, by definition, negatively affected.

resulting from the Proclamation, further inhibiting the *amici*'s work.

One of the primary objectives of the Proclamation is "to protect . . . citizens from terrorist attacks."[10] For many foreign artists, their work is a vehicle for political dissent and social commentary, and is frequently among the most effective critiques of the inequities in their countries and the corruption in their governments. By denying entry to certain nationals of the Designated Countries, including nationals of six predominately Muslim countries, the Proclamation limits the kinds of international collaboration and artistic expression that foster tolerance and understanding of others, which help protect us from the very threats the Proclamation is intended to mitigate.

ARGUMENT

A successful art exhibition or performance represents the culmination of the time, talent, and expense of dozens of individuals. The *amici* museums cannot commit to launching a significant exhibition or performance if there is a substantial risk that one or more of the key persons involved will not be able to contribute as required.

Because the Proclamation's ban on travel is indefinite in duration, many of the *amici* are, and will remain, unable to commit to exhibitions or

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[10] Proclamation No. 9645, 82 Fed. Reg. 45,161 (Sept. 24, 2017) (Section 1(a)).

performances involving artists, scholars, or curators from the Designated Countries. The loss of these projects causes substantial harm to the *amici* and the public in general. It does so by depriving Americans of important works of art, great performances, and scholarly presentations, thereby denying the public opportunities to gain insights into the history, culture, and aspirations of the people of the Designated Countries.

Addressing the Proclamation's violation of the Establishment Clause, the District Court of Maryland correctly stated that it is in the public interest to "avoid sowing seeds of division in our nation."[11] As the examples below illustrate, many of the art exhibitions and performances that will not occur because of the Proclamation promote the kind of understanding that makes us less divided and less prone to conflict.

A. Important Exhibitions and Performances Would Not Have Occurred Had the Proclamation Been in Effect at the Time

Had the Proclamation been in effect during previous years, countless exhibitions and performances, which have enriched American understanding of other cultures, would not have occurred.

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[11] *Int'l Refugee Assistance Project v. Trump*, 265 F. Supp. 3d 570, 630 (D. Md. 2017).

For instance, as part of its mission, the Cleveland Museum of Art ("CMA") organizes performances of musicians and other artists from many areas of the world. At these events, thousands of people are able to hear, see, and experience music, dance, and film from across the globe. In the recent past, these performances have included at least one artist from a Designated Country, who would not have been able to participate had the Proclamation been in place at that time. Through his performance, the musician exposed the large audience to musical traditions from the Designated Countries and, by fusing Eastern and Western genres, promoted understanding and tolerance of individuals from the Designated Countries generally. If the Proclamation had been in effect at that time, CMA's efforts to provide the public with the most diverse, inspiring, and thought-provoking music from around the world would have been curtailed.

B. The Proclamation Stifles the Participation of Persons Integral to the *Amici*'s Mission

The Proclamation has barred individuals integral to successful exhibitions from entering the country. Moreover, the Proclamation has exacted a toll on individuals, who may be permitted to travel to the United States, but have been discouraged from doing so because of the increased scrutiny resulting from the Proclamation.

One *amici* museum reports that the Proclamation has had detrimental consequences for its joint program in art history with a local university. An exceptionally qualified Iranian

scholar was barred from entering America under the Proclamation. The U.S. Consul in Florence denied one of the program's teaching candidate finalists—a highly regarded, Cambridge-educated Iranian now living in Italy who studies Islamic art—a visa to enter the United States to interview for the position. The letter from the U.S. Consul stated that there was no option to request reconsideration. As a professor, the Iranian scholar would have contributed to the museum in a number of ways, including by giving public lectures and co-organizing exhibitions and lecture series. The museum also does not currently have an Islamic art specialist on its staff, and the Iranian scholar's expertise could have helped assess and grow the museum's Islamic art collection and ensure that the presentation of the collection was more vibrant for visitors. As a result, the museum and the American public were deprived of the contributions of a noted scholar and the value she would have imparted upon the museum and its visitors.

Furthermore, while the text of the Proclamation provides that it is applicable only to nationals of the Designated Countries, its effects are not so limited. The Proclamation also jeopardizes exhibitions that are made possible through site visits by nationals of the Designated Countries. Covered nationals—such as the foreign artists, lenders, curators, scholars, couriers, donors, and conservators who make these exhibitions possible—live all over the world. Many of these nationals, regardless of whether they are directly covered by the Proclamation, are unwilling to travel to the United States because of the perceived risks associated with attempting to enter the country and the sense of

animus that the Proclamation has created toward people from certain countries. As a result, many of these critical figures are refusing to enter the United States, which imposes additional burdens on the *amici* museums' efforts to fulfill their artistic missions.

For instance, prominent sculptor Parviz Tanavoli—a dual-national of Iran and Canada—decided after the first Executive Order that although one of his sculptures was on display at New York's Museum of Modern Art, he would not travel to the United States in part "to avoid the risk of being held and interrogated just because I was born in Iran."[12] Tanavoli has been hailed as "an Iranian cultural ambassador and described as one of the most prominent contemporary artists in the Middle East."[13] He has previously been detained in Iran and accused of "disturbing the public peace" because of his provocative artwork.[14]

In addition, a senior curator at the Museum of Contemporary Art Chicago ("MCA Chicago") has

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[12] Gareth Harris, *Iranian Art Market Branches Out*, Financial Times (Mar. 17, 2017), https://www.ft.com/content/3f1a3b30-fe81-11e6-8d8e-a5e3738f9ae4.

[13] Zulekha Nathoo, *MoMA Takes Quiet Stand Against Trump Travel Ban—and a Canadian Artist Is Part of It*, CBC News (Feb. 7, 2017), http://www.cbc.ca/news/entertainment/moma-muslim-art-protest-1.3968411.

[14] Rachael Pells, *Iranian Artist Parvis Tanavoli Accused of 'Disturbing Public Peace' with Nude Artworks*, Independent (July 11, 2016), http://www.independent.co.uk/arts-entertainment/art/news/iranian-artist-parviz-tanavoli-accused-of-disturbing-public-peace-with-nude-artworks-a7131386.html.

experienced discriminatory treatment while traveling to and from America for his work since the enactment of the Proclamation and prior Executive Orders. The senior curator is highly regarded in his field and was trained in London. Although he is an Egyptian national, he holds a U.S. green card and carries a U.K. passport. Since the enactment of the Proclamation and prior Executive Orders, the senior curator has been delayed and extensively questioned on *every occasion* of traveling to or from America, and he has also been detained and required to undergo a strip search while traveling. Because of the frequency of the senior curator's delays at the U.S. border, MCA Chicago has created a procedure to mobilize resources to lobby for his release in case of his detention. The senior curator has also limited his international travel when possible. MCA Chicago has been unable to send another curator to travel in his place, given his level of expertise and area of specialized practice.

The direct consequences of the Proclamation prevent or discourage these important persons from traveling to and from the United States. Thus, the Proclamation stifles the *amici* museums' efforts to promote artistic expression from around the world, and to give the American public the broadest cultural experience possible.

C. The Proclamation Has Created a "Chilling Effect," to the Detriment of the *Amici* and the American Public

Because of the uncertainty surrounding the Proclamation, the *amici* museums are now doubtful

of their plans for future exhibitions that rely on the support of persons who are covered nationals of the Designated Counties. More broadly, several of the *amici* museums have also faced increased difficulty securing donations and funding for philanthropic efforts because of the sense of animus that the Proclamation has engendered. When these exhibitions are canceled, or never planned, the American public is denied the opportunity to view and study unique works of art that provide an invaluable window into world culture.

The Portland Art Museum, for instance, has become concerned about its ability to obtain the proper visas for internationally renowned Syrian calligrapher, Khaled Al-Saa'i. Al-Saa'i uses Arabic calligraphy as a medium of expression to create dramatic abstract compositions, such as a mural representing the Syrian civil war.[15] He has previously exhibited in the United States and has taught as visiting faculty at several American institutions. Al-Saa'i is slated to create a mural covering the Portland Art Museum's indoor sculpture court, but that is in question due to the Proclamation.

The Proclamation has also chilled investment in the *amici*'s mission in a variety of ways, including the potential decrease of funding for nonprofit efforts. For example, one *amici* museum reported

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[15] Marion Kudla, *Khaled Al-Saa'i Brings Calligraphy Art to Swarthmore*, Phoenix (Mar. 31, 2016), http://swarthmorephoenix.com/2016/03/31/khaled-al-saai-brings-calligraphy-art-to-swarthmore/.

that a foreign trustee has indicated he may no longer donate to the museum (as well as other U.S. nonprofits) because of the additional scrutiny he has received while traveling to and from the United States, which he believes has been fueled by his apparent ethnicity.

The full consequences of the Proclamation to the *amici* can only be appreciated by multiplying these examples many times over. Similar exhibitions and events will not occur because lenders, curators, and scholars will be unable or unwilling to attend the exhibitions, speak at the openings, and work with their American colleagues on the catalogues in the United States, so long as the Proclamation continues to create uncertainty and fear for those foreign artists and other necessary participants who would otherwise contribute to exhibitions and performances in the United States.

D. The Waiver Provision Does Not Prevent This Harm

The Proclamation's waiver provisions do not protect the *amici*'s interests. Section 3(c) of the Proclamation provides for discretionary waivers of an otherwise-barred foreign national if he or she can show that "(A) denying entry would cause the foreign national undue hardship; (B) entry would not pose a threat to the national security or public safety of the United States; and (C) entry would be in the national interest."[16] Neither "undue hardship" nor "national

[16] Proclamation No. 9645, 82 Fed. Reg. 45,161 (Sept. 24, 2017) (Section 3(c)(i)).

interest" is defined in the Proclamation and the Government has provided no official guidance on how it will interpret and apply these terms. Section 3(c)(iv)(C) provides that a waiver may be appropriate for a foreign national "enter[ing] the United States for significant business or professional obligations and [where] the denial of entry would impair those obligations."[17] What might amount to "significant business or professional obligations" is not further defined or clarified in the Proclamation or elsewhere. And as Respondents noted in their brief, as of February 15, 2018, only two waivers have been granted since the Proclamation went into effect.[18]

Museums plan exhibitions and performances months, and often years, in advance. The uncertainty of whether artists or other necessary personnel will receive discretionary waivers, based on ambiguous and undefined criteria, will effectively prevent the *amici* museums from planning many exhibitions and performances that are dependent on persons covered by the Proclamation.[19]

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[17] *Ibid* (Section 3(c)(iv)(C)).

[18] Brief for Respondents at 20, *Trump v. Hawaii*, No. 17-965 (Mar. 23, 2018) (citing Yeganeh Torbati & Mica Rosenberg, *Exclusive: Visa Waivers Rarely Granted Under Trump's Latest U.S. Travel Ban: Data*, Reuters (Mar. 6, 2018), https://goo.gl/4w3F3W).

[19] Moreover, the Proclamation does not specify the process for obtaining a waiver. Even if the *amici* wanted to plan an exhibit involving a barred individual, it is unclear how they or the artist would obtain a waiver, adding further to the uncertainty the *amici* face.

CONCLUSION

The Proclamation harms the *amici* and the public by preventing or discouraging many artists, lenders, curators, and scholars from traveling to the United States. Without their presence, *amici* museums will, in many cases, be unable to hold performances and showcase art originating from the Designated Countries, as well as other parts of the world—art and performances that often foster the tolerance and understanding needed to deter the kinds of conflict that the Proclamation purports to be trying to prevent. The Court should affirm the court below and allow this important art to be shown and performances to be held in the United States, as both make a significant contribution to our culture and the richness of American society.

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APPENDIX

APPENDIX

The following is a complete list of the 112 *amici* art museums:

Ackland Art Museum
(Chapel Hill, NC)
Albright-Knox Art Gallery
(Buffalo, NY)
Allen Memorial Art Museum
(Oberlin, OH)
Andy Warhol Museum
(Pittsburgh, PA)
Art Institute of Chicago
(Chicago, IL)
Asian Art Museum of San Francisco
(San Francisco, CA)
Barnes Foundation
(Philadelphia, PA)
Boca Raton Museum of Art
(Boca Raton, FL)
Bronx Museum of the Arts
(Bronx, NY)
Brooklyn Museum
(Brooklyn, NY)
Carnegie Museum of Art
(Pittsburgh, PA)
Chrysler Museum of Art
(Norfolk, VA)
Cincinnati Art Museum
(Cincinnati, OH)
Clark Atlanta University Art Museum
(Atlanta, GA)

Cleveland Museum of Art
(Cleveland, OH)
Clyfford Still Museum
(Denver, CO)
Colby College Museum of Art
(Waterville, ME)
Columbus Museum of Art
(Columbus, OH)
Contemporary Art Museum St. Louis
(St. Louis, MO)
Contemporary Arts Center
(Cincinnati, OH)
Contemporary Arts Museum Houston
(Houston, TX)
Crocker Art Museum
(Sacramento, CA)
Crystal Bridges Museum of American Art
(Bentonville, AR)
Currier Museum of Art
(Manchester, NH)
Dallas Museum of Art
(Dallas, TX)
Denver Art Museum
(Denver, CO)
Des Moines Arts Center
(Des Moines, IA)
Detroit Institute of Arts
(Detroit, MI)
Dia Art Foundation
(New York, NY)
Fine Arts Museums of San Francisco
(San Francisco, CA)
Flint Institute of Arts
(Flint, MI)

Fralin Museum of Art at the University of Virginia (Charlottesville, VA)

Frances Lehman Loeb Art Center (Poughkeepsie, NY)

Frick Collection (New York, NY)

Frist Center for the Visual Arts (Nashville, TN)

Frye Art Museum (Seattle, WA)

George Eastman Museum (Rochester, NY)

Herbert F. Johnson Museum of Art (Ithaca, NY)

High Museum of Art (Atlanta, GA)

Hillwood Estate, Museum & Gardens (Washington, DC)

Honolulu Museum of Art (Honolulu, HI)

Hood Museum of Art (Hanover, NH)

Indianapolis Museum of Art (Indianapolis, IN)

Institute of Contemporary Art, Boston (Boston, MA)

Institute of Contemporary Art, University of Pennsylvania (Philadelphia, PA)

Isamu Noguchi Foundation and Garden Museum (Long Island City, NY)

J. Paul Getty Trust (Los Angeles, CA)

Jewish Museum (New York, NY)

Jordan Schnitzer Museum of Art
(Eugene, OR)
Joslyn Art Museum
(Omaha, NE)
Laguna Art Museum
(Laguna Beach, CA)
List Visual Arts Center
(Cambridge, MA)
Los Angeles County Museum of Art
(Los Angeles, CA)
Memorial Art Gallery, University of Rochester
(Rochester, NY)
Memphis Brooks Museum of Art
(Memphis, TN)
Metropolitan Museum of Art
(New York, NY)
Michael C. Carlos Museum of Emory
University (Atlanta, GA)
Mildred Lane Kemper Art Museum,
Washington University (St. Louis, MO)
Minneapolis Institute of Art
(Minneapolis, MN)
Missoula Art Museum
(Missoula, MT)
Montclair Art Museum
(Montclair, NJ)
Morgan Library & Museum
(New York, NY)
Muscarelle Museum of Art
(Williamsburg, VA)
Museum of Art, Rhode Island School of Design
(Providence, RI)
Museum of Contemporary Art Chicago
(Chicago, IL)

Museum of Contemporary Art Cleveland
(Cleveland, OH)
Museum of Contemporary Art Denver
(Denver, CO)
Museum of Contemporary Art, Los Angeles
(Los Angeles, CA)
Museum of Contemporary Art San Diego
(San Diego, CA)
Museum of Contemporary Art Santa Barbara
(Santa Barbara, CA)
Museum of Fine Arts, Boston
(Boston, MA)
Museum of Fine Arts, Houston
(Houston, TX)
Museum of Fine Arts, St. Petersburg
(St. Petersburg, FL)
Museum of Modern Art
(New York, NY)
Nasher Museum of Art at Duke University
(Durham, NC)
Nasher Sculpture Center
(Dallas, TX)
Nelson-Atkins Museum of Art
(Kansas City, MO)
New Museum
(New York, NY)
New Orleans Museum of Art
(New Orleans, LA)
Norman Rockwell Museum
(Stockbridge, MA)
North Carolina Museum of Art
(Raleigh, NC)
Oakland Museum of California
(Oakland, CA)

Orlando Museum of Art
(Orlando, FL)
Peabody Essex Museum
(Salem, MA)
Pennsylvania Academy of the Fine Arts
(Philadelphia, PA)
Pérez Art Museum Miami
(Miami, FL)
Philadelphia Museum of Art
(Philadelphia, PA)
Philbrook Museum of Art
(Tulsa, OK)
Portland Art Museum
(Portland, OR)
Portland Museum of Art
(Portland, ME)
Pulitzer Arts Foundation
(St. Louis, MO)
San Antonio Museum of Art
(San Antonio, TX)
San Diego Museum of Art
(San Diego, CA)
Santa Barbara Museum of Art
(Santa Barbara, CA)
Seattle Art Museum
(Seattle, WA)
Smith College Museum of Art
(Northampton, MA)
Solomon R. Guggenheim Museum
(New York, NY)
Studio Museum in Harlem
(New York, NY)
Telfair Museums
(Savannah, GA)

Toledo Museum of Art
(Toledo, OH)
Virginia Museum of Fine Arts
(Richmond, VA)
Wadsworth Atheneum Museum of Art
(Hartford, CT)
Walker Art Center
(Minneapolis, MN)
Walters Art Museum
(Baltimore, MD)
Weisman Art Museum
(Minneapolis, MN)
Westmoreland Museum of American Art
(Greensburg, PA)
Wexner Center for the Arts
(Columbus, OH)
Whitney Museum of American Art
(New York, NY)
Williams College Museum of Art
(Williamstown, MA)
Worcester Art Museum
(Worcester, MA)
Yale University Art Gallery
(New Haven, CT)
Zimmerli Art Museum at Rutgers University
(New Brunswick, NJ)